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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1198

RELIANCE INSURANCE COMPANY, *Petitioner,*

v.

BLOUNT BROTHERS CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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STATUTES:

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MISCELLANEOUS:

5 Moore's Federal Practice, 2d. Ed. § 50.02[1] 4

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OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A of Petition) is reported at 370 F.2d 733.

STATUTE INVOLVED

Rule 19(1)(b) of the Rules of this Court, setting forth considerations governing review on certiorari from a court of appeals, is set forth in the Appendix hereto. Rule 50 of the Federal Rules of Civil Procedure, in pertinent part, is set forth in Appendix B to the Petition.

QUESTION PRESENTED

Where a construction subcontractor admittedly had failed to perform in several respects its written contract with the respondent prime contractor, may a court of appeals review the record to determine whether there was any evidence to excuse such non-performance, and, finding no such evidence, reverse a judgment in favor of the subcontractor's surety company?

STATEMENT

Petitioner has omitted mention of one important fact in its statement of the case: At the trial it was admitted that petitioner's principal, the William Dunbar Company, Inc. ("Dunbar"), had failed to perform certain essential obligations of its contract with respondent. The record so shows (R. 472, 473, 673, 782, 789, 801, 838), and the Court of Appeals below so found. (370 F.2d at 740, Petition, pp. 13a, 14a)

ARGUMENT

This case, as every other case, is certainly important to the parties, but it is, after all, merely another run-of-the-mine contract case between two commercial enterprises, an insurance company and a general contractor. The sole issue is whether there was any evidence to excuse the admitted failure of a subcontractor

(petitioner's principal) to perform its contract with the respondent general contractor. There is nothing presented which would warrant review by this Court on certiorari; there is no public interest in the case, no conflict in circuits, no federal question decided in conflict with applicable decisions of this Court, nor any departure from the accepted and usual course of judicial proceedings.

I.

Petitioner declares that the Court below found that there were no admissions that Dunbar, petitioner's principal, had failed to perform its contract with respondent. (Petition, pp. 5, 6). In this respect petitioner erroneously represents the state of the record. The Court below found directly to the contrary: it *specifically* held that petitioner's counsel and Dunbar's president had admitted that Dunbar failed to perform in accordance with the contract:

> *"The argument of counsel and the testimony of Mr. Dunbar was in effect an admission that certain things that were called for by the contract had not been done, but they attempted to excuse the failure of performance* in what at common law pleading used to be called confession and avoidance. Thus it becomes necessary for the Court to examine the excuses given for the failure to carry out the exact terms of the contract." (370 F.2d at 740, Petition, p. 13a) (Emphasis added).

II.

Petitioner contends that it was error for the Court below to read the record:

> "The basic error of the lower Court lies in the fact that it . . . felt free to study the entire record . . . ." (Petition, p. 5)

Thereupon, petitioner contends, the Court below fell into further error when it allegedly weighed the evidence and substituted its factual opinions for that of the jury.

On appeal from a judgment denying a motion for a judgment *non obstante veredicto* a court of appeals is under a duty to review the record to determine whether there is any evidence to support the verdict. 5 Moore's Federal Practice, 2d Ed. § 50.02[1] If the Court finds any evidentionary support, it must affirm; on the other hand, if it finds none, it must reverse, or else there is no substance to Rule 50 of the Federal Rules of Civil Procedure, and motions for a directed verdict and for judgment notwithstanding the verdict are meaningless gestures.

The opinion of the Court below clearly reveals that it is understood and acted in accordance with both the limitations and the duties placed upon it. It did not weigh the evidence, nor did it substitute its factual findings for those of the jury. It reviewed the record in the light of the several admitted failures of performance, and, *as to some of those failures,* found there were *no* facts presented to the jury which would excuse the failures. Therefore, it had to reverse. The Court said, at 370 F.2d 740 (Petition, p. 14a):

> "If, upon application of the proper legal principles, there was evidence which would have amounted to a defense against performing the requirements, this court could not review the jury's resolution of such factual issues. On the other hand, if there were substantial failures to perform, as was admitted, and there were no facts presented to the jury which, under the law, would excuse performance, then the jury verdict should

have been set aside on the motion, and the judgment should be reversed by us.

"We conclude from a careful reading of the record, that *as to several of the failures of the Dunbar Company, there were no issues of fact, which, if resolved in favor of Dunbar would excuse such failure.* We conclude, therefore, that as to the issue of breach of the contract the verdict should have been directed by the trial court." (Emphasis added)

III.

Petitioner received a full and fair hearing in the Court below. Dissatisfied with the result, petitioner seeks another hearing in this Court. However, as stated by Chief Justice Taft in *Magnum Import Co.* v. *Francois Joseph de Spoturno Coty* (1923), 262 U.S. 159, at 163:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals . . . was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

The Court of Appeals below was required to hear this case; this Court is not required to do so and should not. Rule 19(1)(b), Supreme Court Rules.

The petition for writ of certiorari should be denied because:

(1) There is no showing of a question of sufficient public importance to justify review by this Court.

(2) This case does not fall within the guide lines for granting certiorari set out in this Court's Rule 19(1)(b).

(3) The decision of the Court of Appeals is correct; there is no evidence in the record which would support the judgment of the trial court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Supreme Court Rule 19(1)(b) provides:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."